ABORIGINAL RIGHTS

Current Issue Review

89-11E

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Revised 7 October 1996

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Ottawa, Canada K1A 0S9

Catalogue No. YM32-1/89-11-1996-10E
ISBN 0-660-16768-9

N.B. Any substantive changes in this publication which have been made since the preceding issue are indicated in **bold print.**

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ABORIGINAL RIGHTS*

ISSUE DEFINITION

The concept of "aboriginal rights" is difficult to define succinctly. The recognition or affirmation of aboriginal rights in Canadian law, both in the common law and statutes, is continually evolving. In the last 20 years, there have been significant developments. In 1973, in *Calder* v. *The Attorney General of British Columbia*, the Supreme Court of Canada recognized Indian title as a legal right, derived from aboriginal peoples' historic occupation of the land, and not dependent on treaty, executive orders or legislative enactments. Since the enactment of section 35 of the *Constitution Act, 1982*, a body of case law interpreting the section has developed and is continuing to grow. The Supreme Court of Canada first considered the scope of section 35 in *R.* v. *Sparrow*. Significantly, the court made it clear that the rights recognized and affirmed by section 35 are not absolute and outlined a test whereby the Crown may justify legislation that infringes on aboriginal rights. More recently, the Supreme Court of Canada in a trilogy of cases dealing with commercial fishing rights (*R.* v. *Van Der Peet*, *R.* v. *Smokehouse* and *R.* v. *Gladstone*) laid further groundwork on how aboriginal rights should be defined. The Court decreed that one must apply a purposive approach to interpret section 35 of the *Constitution Act, 1982*; in other words, one must identify the interests that section 35 was intended to protect, namely the practices, traditions and customs central to aboriginal societies that existed in North America prior to contact with

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* This paper is based on work originally done by Elaine Gardner-O'Toole, Law and Government Division. The original version of this Current Issue Review was published in November 1989; the paper has been regularly updated since that time.

the Europeans. To be recognized as an aboriginal right, the practice, tradition or custom must have been an integral part of the distinctive culture of aboriginal peoples, although it may have evolved into a modern form. The Court reiterated that section 35 did not create the legal doctrine of aboriginal rights, but emphasized that they already existed under the (federal) common law. The Crown can no longer extinguish existing aboriginal rights, but may only regulate or infringe upon such rights consistent with the test laid out in the *Sparrow* decision.

BACKGROUND AND ANALYSIS

A. Royal Proclamation of 1763

According to Professor Richard H. Bartlett of the University of Saskatchewan, while early British imperial policy required recognition of aboriginal title, the policy was not reinforced by local governments. The 1763 rebellion led by Chief Pontiac led to the Royal Proclamation of 1763. Its preamble stated that it was:

> just and reasonable, and essential to our interest, and the security of our colonies, that the several Nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominion and Territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds.

Therefore, while prior to 1763 treaties did not necessarily deal with land rights (as evidenced by the treaties of peace and friendship concluded in the Maritimes), subsequent to 1763 the Crown and Indian nations entered into treaties and agreements with respect to land rights and other rights.

Generally speaking, where Indian bands ceded their rights to land in treaties, the Crown undertook to fulfill certain obligations in return. Often, lands set aside or reserved for exclusive use by Indians were promised, as well as the annual payment of moneys. In Treaty 6, for example, it was promised that "a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent." The terms of a treaty

determine the rights and obligations of the parties. As might be expected, the interpretation of such documents and the determination of the rights and obligations they confer have often been the subject of litigation.

Four decisions of the Supreme Court of Canada are illustrative. In *R.* v. *Sioui*, the Court struck down the conviction of members of the Huron band on charges of cutting down trees, camping, and making fires in unauthorized places, contrary to Quebec regulations. The accused alleged that they were practising certain ancestral customs and religious rites subject to a treaty between the Huron and the British, and that, therefore, by virtue of section 88 of the *Indian Act*, the provincial law did not apply. The treaty relied upon was a 1760 document signed by General Murray. The Court found that the treaty protected the activities in question. In *Horseman* v. *R.* the appellant had been acquitted at trial, on a charge of trafficking in a grizzly hide contrary to the *Alberta Wildlife Act*, on the grounds that his Treaty 8 hunting rights included the right to barter. On appeal, it was held that the Alberta Natural Resources Transfer Agreement of 1930 had limited the Treaty 8 hunting rights to a right to hunt for food. The Supreme Court of Canada affirmed the decision. In August 1991, the Supreme Court of Canada rejected the claim of the Temagami Indians for portions of land in northern Ontario. The Court held that the band had surrendered its rights to the land by actions subsequent to the Robinson-Huron Treaty of 1850, by which the Indians agreed to adhere to the Treaty in exchange for annuities and a reserve. On 12 May 1994, the Supreme Court of Canada, in *Howard* v. *The Queen*, confirmed lower court rulings that a clause in the 1923 Williams Treaty clearly extinguished the rights of the Hiawatha signatories and their descendants to fish in all lands in Ontario. The Supreme Court recognized in *Howard* that the terms of the Treaty did provide for one exception: the Hiawatha would be permitted to exercise their traditional harvesting rights on reserves "set apart by His Majesty the King." Following the Court's decision, the Ontario NDP government negotiated an agreement with native leaders to acknowledge aboriginal fishing rights off-reserve. The current Conservative government has, however, decided not to extend the application of this agreement.

B. *Constitution Act, 1867* and the *Indian Act*

Aboriginal people have always occupied a unique constitutional position in Canada. They are the only group of people to whom a distinct head of power refers: section 91(24) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction over "Indians and lands reserved for the Indians." For jurisdictional purposes, the case law has held that the term "Indians" includes the Inuit. It is under this authority that the federal *Indian Act* was passed. There are many other constitutional expressions of the special status of aboriginal people in the statutes, documents and conventions that collectively make up the Constitution of Canada (e.g. the hunting, fishing and trapping protection under the Natural Resources Transfer Agreements for each of the prairie provinces).

The *Indian Act, 1876* consolidated various pieces of pre-Confederation legislation addressing the interests of Indians in Canada. The Act defined the term "Indian" and sought to protect Indians and Indian land, while seeking assimilation of Indian people into mainstream society. One of the areas dealt with in the Act is the application of provincial law to Indians. Section 88 of the present-day *Indian Act*, in essence, states that provincial laws of general application not dealing with Indian land matters shall apply to Indians on and off reserve. This is not the case if the provincial laws conflict with:

- federal legislation, including a valid band by-law under the *Indian Act*;
- a treaty right; or
- an aboriginal right (as defined by litigation regarding section 35 of the *Constitution Act, 1982*).

Provincial laws "of general application" have been described by the Supreme Court of Canada as laws that extend uniformly throughout the jurisdiction and are not intended to single out Indians for special treatment or to affect the status or rights of Indians (*Dick* v. *R.*, [1985] 2 S.C.R. 309 (B.C.)). Such laws apply simply by virtue of provincial legislative competence under section 92 of the *Constitution Act, 1867*. As J. Woodward stated in his text *Native Law*, a provincial game law would not be applicable on reserve if the courts saw it as relating to the use of

land and so invading exclusive federal jurisdiction over "lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867.*

Before the enactment of section 35, the Supreme Court held that where provincial laws of "general application" were enacted for a valid purpose, such as conservation or safety, and also happened to have an incidental and negative effect on Indian hunting rights, they might apply to Indians - if the laws were not in conflict with a recognized treaty right or valid federal legislation. Thus, before the enactment of section 35, there was protection against provincial laws incidentally limiting Indian hunting rights only where there was a conflict with a treaty right or where valid federal legislation could be established. Section 35 now provides a further shield against provincial laws of this type where the existence of an aboriginal right can be established. Valid restrictions of treaty rights in existence before 1982, however, remain in effect. As noted above, in the case of *Horseman*, the Supreme Court of Canada interpreted the hunting rights provisions of the Natural Resource Transfer Agreements (NRTA) as entailing valid pre-1982 restrictions of certain treaty rights. **The Supreme Court of Canada recently clarified that the NRTA extinguished only the protection of the right of Treaty 8 signatories to hunt commercially; the right to hunt for food continued to be protected, and was even expanded under the NRTA. As a result, the Supreme Court ruled that signatories to Treaty 8 retained the right to hunt on privately owned land within the geographic limitations set out in the Treaty, if the land was not being put to any visible use (*R.* v. *Badger*, [1996] 1 S.C.R. 771).**

The Minister of Indian Affairs and Northern Development released in September 1996 his department's proposed amendments to the *Indian Act*, which were circulated to all Chiefs, Councillors and Leaders of First Nation Organizations for their input. Many amendments would simply remove the requirement for Ministerial approval in order to engage in certain activities, thereby giving First Nation governments more control over their own affairs. For example, band councils would, under a revised section 20, grant certificates of possession for land without having to seek the approval of the Minister. Several sections prohibiting the sale or barter of certain goods by Indians

would also be repealed. The amendments would also clarify under a new section 16.1 that a band has the same rights, obligations and capacities as a person. Several key sections of the *Indian Act* would remain unchanged. There are no proposals to amend the sections dealing with band membership or Indian status (sections 5 to 14). The exemption from taxation would be unchanged (section 87) as would the restriction against seizure of property situated on a reserve (except for leasehold interests, which could be controversial) (section 89). The Assembly of First Nations has rejected the proposed amendments and called for an expanded consultation process.

C. The *Constitution Act, 1982*

1. Section 35

Section 35 of the *Constitution Act, 1982*, states:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

With the entrenchment of section 35, there have been a number of cases dealing with aboriginal rights. The leading case in the interpretation of section 35 is *Sparrow* v. *The Queen*, decided in 1990 by the Supreme Court of Canada. The issue was whether the net length restriction contained in the Musqueam band's food fishing licence issued under the *Fisheries Act* regulations was inconsistent with section 35. The Court laid out a framework to assess whether the

regulation was a justifiable limit on aboriginal rights and returned the case to the lower courts for determination.

Sparrow clearly rejected the proposition that the words "affirmed and recognized" involve a simple acknowledgment of aboriginal and treaty rights with no substantive legal effect or constitutional entrenchment. It points out that section 35 can limit the application of federal as well as well as provincial law with respect to all aboriginal peoples. Criteria to be applied to determine whether a federal statute infringes on an existing aboriginal or treaty right contrary to the meaning and intent of section 35 are set out.

In general terms, the Court in *Sparrow* held that, while section 35 does not provide immunity from government regulation, it does require that statutory infringements on the protected rights be justified in terms of a valid legislative objective and in a way that upholds the honour of the Crown and is consistent with "the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples." The analysis applied by the Court to determine the existence of an unjustified infringement may be summarized as follows:

- The person claiming an infringement has the burden of proof as to whether the regulation or statute in question constitutes a *prima facie* infringement of section 35. In determining whether an existing aboriginal right has been interfered with, it is asked whether the purpose or effect of the legislation unnecessarily infringes the interests protected by that right. Relevant questions might be: Is the limitation reasonable? Does the regulation cause undue hardship? Does the regulation deny the holders of the right their preferred means of exercising it?

- If a *prima facie* infringement is established, then a two-step test of justification must be met by the government or party seeking to uphold the legislation. First, is there a valid legislative objective (such as a genuine intent to ensure conservation or safety)? If there is, the honour of the Crown and the special trust relationship and responsibility of the government *vis-à-vis* aboriginal people must be considered. Within the analysis of justification, the Court stated that, depending on the circumstances of the inquiry, there are further questions to be addressed; for example, whether there has been as little infringement as possible in effecting the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group has been consulted with respect to the regulatory measures implemented.

This analysis would apply to aboriginal and treaty rights issues on or off reserve.

Essentially, the Court's approach to section 35 is that past and future regulation affecting aboriginal and treaty rights must be examined on a case-by-case basis; it will be upheld if enacted for a "valid legislative concern," such as conservation or safety and if it is consistent with the federal government's fiduciary obligations to aboriginal people. This view maintains that aboriginal rights are not absolute or immutable and, like other rights in the Canadian legal system, must be subject to a balancing of interests and values with respect to competing interests. The decision in *Sparrow* is also very significant for its elaboration of the federal government's general fiduciary obligation to aboriginal people, which was described as arising from the Crown's historic dealings with aboriginal people as well as section 91(24) of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982*. Consideration of the scope and content of the Crown's fiduciary duty is part of the test for determining whether or not there has been an infringement of section 35.

Fisheries and Oceans Canada developed an Aboriginal Fisheries Strategy in order to ensure that the holdings in *Sparrow* form a part of fisheries policy in British Columbia. The Strategy was to be the basis of a new social contract among the government, aboriginal peoples and groups of non-aboriginal fishermen. It has, however, proved to be highly controversial in view of the competing interests of the various groups, at a time when fish stocks are in short supply. This policy was reaffirmed on 26 May 1994 by an Order in Council making some technical amendments to the *Aboriginal Communal Fishing Licences Regulations*. The accompanying Regulatory Impact Analysis Statement notes that most communal licences issued to aboriginal groups do not include provisions for sale; those that do so will be continued as pilot projects only.

In late August 1996, the Supreme Court of Canada released a trilogy of cases dealing with the aboriginal right to sell fish (*Van Der Peet*, *Smokehouse* and *Gladstone*). Building on its earlier reasoning in *Sparrow*, the Supreme Court enunciated another test, this one for defining aboriginal rights. The Court decreed that aboriginal rights flow from the practices, traditions and customs central to aboriginal societies that existed in North America prior to contact with the Europeans. To be recognized as an aboriginal right, the practice, tradition or custom must have been an integral part of the distinctive culture of aboriginal peoples. Two dissenting judges saw the restriction to

pre-contact activities as a return to the "frozen rights" doctrine, which had been earlier rejected in *Sparrow*.

The *Van Der Peet* trilogy reinforces the principle that aboriginal rights will be determined on a case-by-case basis. A court will have to scrutinize the historical context and present circumstances of the particular aboriginal community making a claim. The factual determination at trial is critical and will ultimately settle the outcome. It is not surprising, then, that the Supreme Court of Canada rejected the appellants' claim to an aboriginal right to sell fish in *Van Der Peet* and *Smokehouse*, yet endorsed the finding of the trial judge in *Gladstone* that the Heiltsuk had an aboriginal right to fish commercially. Whether an aboriginal community can successfully claim a right to sell fish on a commercial basis will depend on its particular traditions, customs and practices.

2. Section 35(2), (3) and (4)

Section 35(2) defines the term "aboriginal peoples" as including "Indian, Inuit and Metis." This has added to confusion over the meaning of "Indian" for constitutional purposes in general and in particular for section 91(24) of the *Constitution Act, 1867*, which grants jurisdiction to the federal government over "Indians and lands reserved for the Indians." In 1933, the Supreme Court of Canada held that the word "Indians" in that provision encompasses the people then known as "Eskimos," now referred to as "Inuit." It is not clear, however, whether the word "Indians" in section 91(24) includes Metis and non-status Indian people. The federal government has denied any responsibility for the Metis since 1921, when a federal policy of making land and money grants to western Metis towards the extinguishment of their aboriginal title was regarded as completed. The Charlottetown Accord proposed amending the *Constitution Act, 1982* to ensure that 91(24) applied to all aboriginal people.

Section 35(3), provides that "treaty rights" in section 35(1) include rights in existing and future land claims agreements. This is regarded as providing substantive constitutional protection to these agreements. As a result, in the past the federal government took the position that self-government matters were to be negotiated separately from the claims settlement process in

order to avoid constitutional entrenchment of a right to self-government "through the back door." This policy was reviewed by Cabinet and reaffirmed in February 1990. Claims agreements negotiated with the Cree and Naskapi in 1975 and 1978, however, provided for a subsequent negotiation of self-government legislation for the groups concerned. A provincial court decision in Quebec, *Eastmain Band* v. *Gilpin*, held that the federal legislation enacted pursuant to these agreements, the *Cree-Naskapi (of Quebec) Act*, has been constitutionally entrenched and cannot be altered without a constitutional amendment. It is also not clear whether it is possible for self-government arrangements to be excluded from the protection offered by section 35(1) and (3) when negotiations on self-government are clearly connected to the claims settlement process.

Section 35(4) affirms that aboriginal and treaty rights are guaranteed equally to male and female persons. Justice Muldoon relied on this subsection in *Twinn* v. *The Queen* [1995] 4 C.N.L.R. 121 (Fed. T.D.) to uphold Bill C-31, the 1985 amendments to the *Indian Act*; these allowed Indian women who had married non-Indians to reclaim their Indian status. The plaintiffs, Senator Walter Twinn and others, had argued that the imposition of additional members infringed the bands' right to determine their own membership under section 35 of the *Constitution Act, 1982*, as well as their freedom of association as protected under section 2(d) of the Charter. Justice Muldoon rejected both arguments on the basis that section 35(4) demands equality of rights between male and female persons, no matter what traditional rights or responsibilities may have existed in the past. The court also found that the amended legislation could be supported by the equality provisions (sections 15 and 28) of the Charter.

3. Section 25

Section 25 of the *Constitution Act, 1982* in essence states that the provisions of the *Charter of Rights and Freedoms* shall not be construed so as to abrogate or derogate from "any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal people of Canada." Kenneth Lysyk has said that the salient feature of section 25 is that it does not purport to create new rights but rather to ensure that the rights and freedoms of aboriginal people existing independently of the Charter are not diminished by it. Section 25 is most commonly referred to as a shield,

protecting aboriginal rights from being adversely affected by Charter rights; that is, as a simple non-derogation clause, having no substantive legal effect on aboriginal rights on its own.

4. Sections 37 and 37.1

Sections 37 and 37.1 of the *Constitution Act, 1982* required that a series of constitutional conferences be held on matters directly affecting the aboriginal peoples of Canada and that representatives of the aboriginal peoples be invited to participate in these conferences. Only the conference held in 1983 resulted in further amendment to the provisions enacted in 1982. One of these amendments (section 37.1) extended the required number of conferences from one conference to "at least two additional conferences." In addition, two subsections were added to section 35: subsection 35(3) provides that "treaty rights" in subsection (1) include existing and future land claims agreements; and subsection 35(4) provides that "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." Section 35.1, which was also added in 1983, provides that before any amendment is made to section 91(24) of the *Constitution Act, 1867* or to sections 25, 35 or 35.1 of the *Constitution Act, 1982*, a constitutional conference with aboriginal participation must be convened.

As mentioned above, the conferences failed to produce agreement on how to entrench an aboriginal right of self-government and no further conferences have been scheduled. Notably, section 37.1 does not exclude the convening of further conferences on the subject matter of aboriginal rights. Such convening lies within the discretion of the Prime Minister, except as specified under section 35.1.

D. Proposed Amendment of the *Constitution Act, 1982*

1. Federal Government Proposals, September 1991

On 24 September 1991, the federal government announced proposals for constitutional reform. Included was the proposal that "an amendment to the Constitution entrench a general justiciable right to aboriginal self-government in order to recognize aboriginal peoples'

autonomy over their own affairs within the Canadian federation," and a proposed 10-year delay in the general enforceability of the right. Other proposals included: the entrenchment in the Constitution of a process to deal with outstanding aboriginal issues and guaranteed aboriginal representation in a reformed Senate. The aboriginal people would participate in the constitutional process.

In subsequent discussion on the federal proposals, a key issue for aboriginal people was whether an inherent right of self-government should be recognized in the Constitution rather than merely the right of self-government. Aboriginal people were of the view that what must be recognized was an inherent right of self-government, a historic pre-existing right which did not depend on the Crown for its existence.

The proposal that the right of self-government would apply to all aboriginal people, regardless of where they lived, raised questions about the implementation of this right in practical terms, particularly for those people without a land base.

Also at issue was the balance between individual and collective rights. The Native Women's Association of Canada objected to the Assembly of First Nations' position that aboriginal governments should be able to invoke the notwithstanding clause and render the Charter inapplicable on the grounds that aboriginal women would consequently have no protection under any instrument guaranteeing human and equality rights.

The kinds of powers that aboriginal governments might exercise was the subject of much discussion.

2. Special Joint Committee Proposals, February 1992

The Special Joint Committee on a Renewed Canada and a series of five federally sponsored conferences considered the federal government constitutional proposals. The Committee's Report, which was released on 28 February 1992, made a number of recommendations on aboriginal matters, namely in the areas of aboriginal self-government, the aboriginal constitutional process, representation of aboriginal people in the Senate, and the reference to aboriginal peoples in the "Canada clause."

The Committee recommended the entrenchment in section 35 of the aboriginal peoples' inherent right of self-government within Canada and endorsed the six criteria for such entrenchment outlined in the commentary of the Royal Commission on Aboriginal Peoples, also released in February 1992. With respect to the implementation of self-government, the Committee indicated that this would require negotiations on what jurisdiction was to be exercised by self-governing communities. It recommended the entrenchment of a transition process to identify the responsibilities of aboriginal governments and their relationship with the federal, provincial and territorial governments. The Committee further noted that the *Charter of Rights and Freedoms* is available to protect individuals from arbitrary government action, and, while not stating explicitly that the Charter should apply to self-governing communities, stated that the fundamental rights and freedoms of all Canadians, including the equality of the rights of men and women, ought to receive full constitutional protection. The Committee recommended that the federal government respond to Metis requests for access to a land and resource base. According to the Committee, a small bureau, jointly managed by the federal government and representatives of the aboriginal peoples, should administer federal treaty obligations, fiduciary and trust responsibilities and the delivery of fiscal transfers that continue after the implementation of various forms of aboriginal self-government.

The Committee recommended that, if so desired, aboriginal peoples should be guaranteed representation in a reformed Senate; furthermore, the Committee endorsed the mechanism and options proposed by the Royal Commission of Electoral Reform and Party Financing.

The Committee recommended that the Canada clause in the amended Constitution should recognize the role of the aboriginal peoples in the development of Canada, as well as their inherent rights as First Peoples. The clause should also recognize their right and responsibility to protect and develop their unique cultures, languages and traditions.

3. Charlottetown Accord on Constitutional Amendment

In August 1992, aboriginal leaders representing the four major aboriginal political organizations, the provincial premiers, the territorial government leaders and the federal government came to a tentative agreement on the amendment of the Constitution. Aboriginal organizations, for the first time in history, were full participants in the talks. The amendments would have included modification of the Senate, a new amending formula, a new division of powers, inclusion of a distinct society clause with respect to Quebec, and the entrenchment of an inherent right of self-government for all aboriginal people.

However, the Accord was rejected by Canadians in an October plebiscite. Aboriginal governments would have been a new "third order" of government; negotiated agreements would have determined the division of powers between federal, provincial and aboriginal governments. The self-government agreement would have been subject to several limitations: the aboriginal governments would have existed within Canada; the *Charter of Rights and Freedoms* would have applied, but aboriginal governments, once established, would have been able to invoke the notwithstanding clause so that it would not apply; a five-year delay would have been imposed before aboriginal leaders could have sought legal enforcement of their right of self-government through the courts; aboriginal laws would have conformed to federal and provincial laws in matters of peace, order and good government. With respect to the financing of self-government, it would not have been constitutionally entrenched but would have been the subject of a political accord that would not have been enforceable in the courts. No new land rights would have resulted from the Accord.

4. Comments of Royal Commission on Aboriginal Peoples

The Royal Commission on Aboriginal Peoples on 13 February 1992 released a document which addressed the federal government's constitutional proposals as they related to self-government. It noted that it was difficult to determine whether the government was proposing to recognize an already-existing inherent right of self-government in the Constitution, or rather to entrench a newly created right conferred on aboriginal peoples by the federal and provincial

governments. The Royal Commission pointed out that the Assembly of First Nations had in its response to the proposals indicated that the right of self-government is an inherent right, flowing from aboriginal occupation of the land. A similar view was expressed by the Native Council of Canada. Rosemary Kuptana, President of the Inuit Tapirisat of Canada, in remarks to the Special Joint Committee, indicated that the word "inherent" does not imply a desire to separate from the Canadian state; rather, it connotes the notion of rights that can be recognized but not granted. Yvon Dumont of the Metis National Council stated that the Metis were not seeking sovereignty from Canada, but recognition within the Canadian Confederation. The commentary noted that Joe Clark had explained that the government was reluctant to use the term "inherent" because, undefined or unmodified, it could be used as the basis for a claim to international sovereignty or to justify a unilateral approach to deciding what laws did or did not apply to aboriginal peoples.

The Royal Commission outlined the historical and legal background of the right of self-government and went on to suggest six criteria for constitutional reform. First, the right of self-government must be identified as inherent. Second, the right should be described so as to make it clear that its extent is circumscribed, in that it recognizes aboriginal governments as coexisting under the Constitution with federal and provincial governments. Third, within a certain constitutional sphere, the powers of aboriginal governments should be sovereign. Fourth, constitutional reform should not proceed in this area without the full involvement of the aboriginal peoples. Fifth, any provision explicitly recognizing the inherent right of self-government should be consistent with the view that this right may already be entrenched in section 35. Finally, any new provision must be justiciable as soon as it is passed.

Using these criteria, the commentary explored four approaches to constitutional reform. The first would be the adoption of a general amendment to section 35 and the addition of a new subsection indicating that subsection (1) includes the inherent right of self-government. As a section 35 right, it would benefit from the rulings in the Supreme Court of Canada decision in *Sparrow*. The second approach would add a preamble to section 35 to indicate that aboriginal peoples have an inherent right, as well as a new subsection indicating that subsection (1) includes the right of self-government within Canada. The third approach would be to include a general recognition clause with a list of subjects to which the right of self-government applies. The fourth

approach would include both a constitutional amendment recognizing the inherent right of self-government and a National Treaty of Reconciliation between aboriginal nations and the federal and provincial governments. Once signed, the treaty would be constitutionally entrenched under section 35 and could provide a context for dealing with the legal ramifications of recognizing an inherent right as the basis for self-government. A subsection would be added to indicate that "existing treaty rights" comprise rights under existing or future treaties, including self-government agreements.

The Royal Commission in August 1993 released a second paper, which explored whether any further constitutional amendment was necessary, given that there were persuasive reasons to regard the right of self-government as a right already entrenched in section 35(1) of the *Constitution Act, 1982*. The right of self-government, according to the Royal Commission, would include the actual right to exercise jurisdiction over certain core subject matters, with a potential right to deal with other matters. Although the paper stressed that self-government initiatives must originate with the aboriginal groups themselves, it also called upon federal and provincial authorities to facilitate their implementation.

In *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment*, the Royal Commission on Aboriginal Peoples called on the federal government to stop demanding extinguishment of aboriginal title to ancestral lands as a condition of settling comprehensive land claims. Once again, the Royal Commission urged governments to accept that aboriginal rights, including rights of self-government recognized by an agreement, are "treaty rights" within the meaning of section 35(1) of the *Constitution Act, 1982*. The Royal Commission also stated that future negotiations should be premised on the understanding that any agreements reached will recognize an inherent right of self-government.

In *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* released in February 1996, the Royal Commission emphasized that aboriginal peoples' inherent right of self-government includes the authority to establish and administer aboriginal justice systems reflecting and respecting their own concepts and processes of justice. The Royal Commission called on the federal, provincial and territorial governments to recognize this right. The Royal Commission did qualify the

right as one that must be exercised within the framework of the Canadian federal system; this would also mean that any legislation enacted by aboriginal governments, including laws governing their own justice systems, would be subject to the *Canadian Charter of Rights and Freedoms*.

5. Current Negotiations

There has been a substantial change in policy since the beginning of the 35th Parliament. The federal government has currently undertaken to recognize the inherent right of self-government for aboriginal peoples, without requiring any further constitutional amendments. The first in a series of meetings to achieve this goal took place on 1 February 1994. It involved provincial, territorial and federal ministers, aboriginal leaders and representatives of the Royal Commission on Aboriginal Peoples. A Memorandum of Understanding was signed on 20 April 1994 with Manitoba First Nations to guide future negotiations for dismantling the Department of Indian Affairs and Northern Development. Minister Ron Irwin has stated that Manitoba will serve as a model for the implementation of aboriginal self-government elsewhere in the country. Chief Ovide Mercredi of the Assembly of First Nations has been highly critical of this administrative agreement and has maintained that any initiative to implement self-government will require further legal and constitutional amendments. On 7 December 1994, Grand Chief Phil Fontaine and Minister Ron Irwin signed a Framework Agreement to dismantle the existing departmental structures, to develop and recognize First Nations governments in Manitoba and to restore to First Nations governments the jurisdictions consistent with the inherent right of self-government.

The new federal policy on self-government, released in August 1995, requires that all future agreements adhere to the following key principles:

- the inherent right of self-government is an existing aboriginal right under the Constitution;
- self-government will be exercised within the existing Constitution;

- aboriginal governments will be subject to the *Canadian Charter of Rights and Freedoms*;

- all federal funding for self-government will be achieved through the reallocation of existing resources, as outlined in the 1995 Budget;

- rights set out in self-government agreements may be protected as treaty rights under section 35 of the *Constitution Act, 1982*; and

- federal, provincial, territorial and aboriginal laws must work in harmony; however, federal and provincial laws of overriding national or provincial importance will prevail over conflicting aboriginal laws.

The federal government has stressed that no single model of self-government will be followed; rather, individual agreements will be negotiated with regional and local aboriginal groups and, where applicable, with the relevant provincial and territorial governments.

E. Aboriginal Title - Land Rights

Until recently, aboriginal rights litigation was primarily concerned with Indian hunting rights and with determining the extent to which the territory of Canada is subject to aboriginal title. Case law has clearly established that surrender of aboriginal title can be made only to the federal Crown and that, upon surrender, the aboriginal interest (outside of the territories) immediately passes to the provincial Crown, producing an unencumbered Crown title to such lands. Case law in the 1970s provided some guidance on how to establish the existence of aboriginal title *(Hamlet of Baker Lake* v. *Min. of Indian Affairs*). However, the case law has not been very informative on the scope and content of aboriginal title. The few cases to have reached the Supreme Court of Canada have not said much more than that aboriginal title exists at common law, independently of the application of the Royal Proclamation of 1763, and that in certain circumstances aboriginal title may give rise to a fiduciary (trust) obligation on the part of the federal government.

In the 1985 decision, *Guerin* v. *The Queen* (S.C.C.), Mr. Justice Dickson, along with three other members of the Court, stated that aboriginal title is a unique interest that is not properly described as a beneficial interest or as a personal "usufructuary" right. He said:

> The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian goes beyond these two features is both unnecessary and potentially misleading.

In the 1989 case *Canadian Pacific Ltd.*, the Supreme Court of Canada stated:

> The inescapable conclusion of the Court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy, although, as the Chief Justice pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology.

Before the late 1960s, aboriginal title issues were typically raised in cases between the two levels of government or between individuals holding conflicting property interests granted by the two levels of government. Several significant cases in this area were decided without any aboriginal litigants. There was also a long period when the *Indian Act* prohibited the collecting of funds for the purposes of aboriginal rights litigation. The continuing narrow focus of land claims litigation in the early 1970s is said to have resulted from the influence of non-native lawyers.

Aboriginal title cases now typically involve much more than mere property rights. Current litigation is raising questions such as the extent to which indigenous political and legal orders have been preserved along with aboriginal title and whether or not an inherent right of self-government exists and has been guaranteed by section 35(1) of the *Constitution Act, 1982*. The Gitskan Wet'suwet'en case, which was argued in early 1990 before the British Columbia Supreme Court *(Delgamuukw* v. *The Queen*), is perhaps the most significant aboriginal title case to reach Canadian courts. The decision rendered by Chief Justice McEachern on 8 March 1991 treated the concept of "Indian title" as interchangeable with that of "aboriginal rights" and defined aboriginal rights as limited to "residential and sustenance user rights." More particularly, aboriginal rights were defined as the people's "rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them."

The trial judge denied the Gitskan and Wet'Suwet'en claims that sovereignty and jurisdiction over traditional lands are incidents of aboriginal title. The Court also held that prior to 1982 aboriginal rights existed at the pleasure of the Crown, which could extinguish them whenever it expressed its intention to do so in a clear and plain fashion. In this case, the aboriginal rights (title) of the Gitskan and Wet'Suwet'en people were considered to have been extinguished by pre-Confederation colonial enactments intended to give unburdened title to settlers.

Many criticized this controversial decision as seriously out of step with such recent Supreme Court of Canada rulings as *Sioui* and *Sparrow* and as revealing a bias in its use of language and analysis. Justice McEachern's ruling was somewhat tempered by the British Columbia Court of Appeal in June 1993. The Court of Appeal recognized that the Gitskan and Wet'Suwet'en people retained their non-exclusive aboriginal rights, based on the use and occupation of their traditional homelands. More importantly, the majority ruled that these sustenance and harvesting rights had not been extinguished by the colonial instruments enacted prior to British Columbia's entering Confederation. The Court of Appeal did not delineate the scope, content and consequences of those rights but preferred to refer the issue to the trial level. The majority did, however, agree with the trial judge that the plaintiffs could not claim a right of ownership in the disputed territory, nor could they assert rights of self-government. The plaintiffs' claim for damages was also dismissed. In *obiter*, the Court of Appeal encouraged the parties to enter into negotiations to achieve some form of aboriginal self-government beyond the framework of the *Indian Act*; the Court of Appeal emphasized that it was beyond the power of the courts to grant such constitutional jurisdiction. The matter, however, has not been finally resolved: the Supreme Court of Canada granted leave to appeal and to cross-appeal in the *Delgamuukw* case on 15 March 1994. At the request of the litigants, the Supreme Court of Canada initially deferred its proceedings until June 1995, so that the parties could engage in treaty negotiations. It has recently been reported that the court proceedings will be resumed in 1997.

In other cases, the Supreme Court of Canada has not defined the nature of "Indian" treaties any more specifically than the concept of aboriginal rights. The Court has held that an Indian treaty is an agreement *sui generis* (unique) which is neither created nor terminated according to the rules of international law (*Simon*). In *Sioui*, the Supreme Court held that in 1760 "relations

with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens." The Supreme Court has, however, enunciated several guiding principles for the interpretation of "Indian" treaty rights. Treaties are to be given a fair, liberal and generous interpretation, and any ambiguity is to be resolved in favour of the aboriginal party. Treaties are to be construed in the sense they would naturally have been understood by the aboriginal party; evidence, by conduct or otherwise, of how the parties understood the treaty is of assistance in determining content (*Simon* and *Nowegijick* cases).

The same principles are to be applied to the threshold question of whether a particular agreement with Indians constitutes a "treaty" (*Simon* (1985) and *Sioui* (1990)). In such an inquiry, the Court must ask whether it was reasonable for the Indians to have assumed that the person with whom they were dealing had the authority to enter into a valid treaty with them, taking into account the circumstances and the position of the other party. The historical context of negotiations is relevant to determining whether a treaty exists, its interpretation and its territorial application where this is not expressly evident (*Sioui*). The Supreme Court of Canada has indicated that the rationale for this liberal approach to treaty interpretation is the disadvantaged bargaining position of the Indian people at the time when these historic treaties were negotiated (*Sioui*).

The *Sioui* case is also significant for holding that an agreement may be a treaty regardless of whether the Indian party could claim historical occupation or possession of any particular lands, and even where the agreement in question deals exclusively with non-land matters, such as political or social rights. The Court rejected the argument that "non-use" of a treaty over a long period of time could extinguish its effect.

The Supreme Court recently decreed, in *R.* v. *Adams* (3 October 1996, file no. 23615) and *R.* v. *Côté* (3 October 1996, file no. 23707), that aboriginal rights may exist independently of aboriginal title. The appellants in both cases were seeking to assert aboriginal fishing rights in Quebec. The Court ruled that section 35(1) of the *Constitution Act, 1982* extends to protection of aboriginal customs that fall short of aboriginal title, even if those rights were not recognized by French colonial law at the time of first contact.

Apart from aboriginal title cases, most of the litigation currently before the courts regarding the interpretation and effect of section 35 is focused on the degree to which treaty and aboriginal rights to hunt and fish may be regulated and diminished by federal and provincial legislation. In various court proceedings, some First Nations have also tried to assert their right to regulate gambling activities on their reserves, as an incident to the right of self-government or as an incident to aboriginal title. **In *R.* v. *Pamajewon* (22 August 1996, file no. 24596), the Supreme Court of Canada rejected such arguments, as well as the bands' own lottery laws. The Supreme Court noted that self-government claims made under section 35(1) were no different from other claims, and would be subject to the same analysis as enunciated in *Van Der Peet*. The Court refused to cast the claim as the right of the First Nations to manage the use of their reserve lands. Rather, the Court described the claim as the right to participate in and regulate gambling activities on reserve. The Court ruled that the evidence at trial did not demonstrate that gambling or regulation of gambling had been an integral part of the distinctive cultures of these particular First Nations at the time of first contact with Europeans. Therefore, the activities in question (high stakes gambling) were not protected by section 35(1) of the *Constitution Act, 1982*. This is not to say that another claimant group could not be successful in its own right, since a Court will be required to examine the specific circumstances of each case (including the specific history and culture of the aboriginal group asserting the claim).**

F. Federal Land Claims Policy

Prior to 1973, the federal government took the position that aboriginal title did not exist as a concept in Canadian common law. The 1973 Supreme Court decision in *Calder* and other lower court decisions caused the government to reverse this position and to issue a formal policy to govern an out-of-court process for negotiating the settlement of claims based upon unextinguished aboriginal title. Such claims have been termed "comprehensive claims" because they are expected to deal with a wide range of issues from land entitlement to wildlife management.

There was also a policy to address "specific claims." These claims are regarded as constituting specific legal obligations arising out of treaties, other agreements, or from federal management and administration of Indian assets.

The process of reaching agreement on comprehensive and specific claims in the past has been very slow. The process and many aspects of the policy itself have been severely criticized by aboriginals and other observers such as the Canadian Bar Association.

The past federal land claims policy attempted to address some but not all of the aboriginal title claims currently being asserted. For example, the federal government generally refused to acknowledge the validity of aboriginal title claims in most of the Maritime provinces, claiming that aboriginal title has been "superseded by law." The government argued that the actions of successive governments before and after Confederation in opening up lands for settlement, granting lands by letters patent, granting rights to third parties and setting aside Indian reserve lands, had the effect of overriding and implicitly extinguishing aboriginal title in all lands other than Indian reserves. This position has been one of the most highly disputed aspects of federal claims policy. A requirement for claimant groups to demonstrate "current use" of territory has also been regarded by indigenous rights advocates as unjust.

Comprehensive claims policy has also been criticized for putting an undue emphasis on extinguishing aboriginal rights, for the federal government's dual role as a party to and adjudicator of claims, and for the use of restrictive legal opinions in assessing claims. A revision of the comprehensive claims policy in 1986, following a federal task force report on the question, failed to answer many of the major criticisms. Some policy changes, however, such as the decision to allow resource revenue sharing as a potential element of claims settlement, have been welcomed by the aboriginal community.

In its policy statement released during the 1993 federal election campaign, the Liberal party stated its commitment to settle land claims through a fair and equitable process. It was recognized that major changes were needed to solve outstanding problems. The new approach advocated the creation, in cooperation with aboriginal peoples, of an independent claims commission to speed up and facilitate the resolution of all claims.

In September 1993, the federal government announced its commitment to a policy of no longer requiring blanket extinguishment clauses as a condition for settling comprehensive land claims. On 22 December 1994, the Minister of Indian Affairs and Northern Development appointed the Honourable A.C. Hamilton as a Fact Finder to study existing federal land claims policy and to explore other possible models for achieving certainty in land claims agreements, without requiring extinguishment of aboriginal rights. In his report released 16 June 1995, Judge Hamilton advised the Minister that certainty could be secured in land claims by incorporating six essential elements in the treaty itself:

- recognition in the preamble that the aboriginal party to the treaty has aboriginal rights in the treaty area;
- setting out in detail the land and resource rights of all parties to the treaty, and the rights of others affected by the treaty;
- mutual assurance clauses in which the parties agree to abide by the treaty and to exercise their land and resource rights only as set out in the treaty;
- mutual statements that the treaty satisfies the claims of all parties to the land covered by the treaty, and that no future claims will be made with respect to land except as they may arise under the treaty;
- a dispute resolution process with broad powers, including binding arbitration and judicial review, to ensure that treaty obligations are met and disagreements are addressed; and
- a workable amendment process whereby the parties can, if they agree, amend certain provisions of the treaty to respond to changing circumstances.

Justice Hamilton also endorsed, in general, the interim report on extinguishment of the Royal Commission on Aboriginal Peoples entitled *Treaty Making in the Spirit of Co-Existence*. In essence, the Royal Commission recommended that the federal government abandon its policy of seeking blanket extinguishment of aboriginal land rights in exchange for rights or other benefits set out in comprehensive agreements. Rather, the Royal Commission urged the government to adopt a policy that views comprehensive agreements as instruments of co-existence and mutual recognition.

1. Comprehensive Claims

Between 1973 and 1989, only three Final Agreements respecting comprehensive claims were reached: the James Bay and Northern Quebec Agreement (1975), the Northeastern Quebec Agreement (1978) and the Inuvialuit Final Agreement (1984). In 1990 there was significant movement; two additional Final Agreements in the North were concluded, but one of these, the Dene/Metis claim in the N.W.T., was not ratified by all the communities. Negotiations continued at the regional level. The Gwich'in Indians of the Mackenzie Delta approved a $75 million land claims deal, the first members of the Dene Nation to do so. The *Gwich'in Land Claim Settlement Act* was given Royal Assent in December 1992. The Tungavik Federation of Nunavut claim in the Eastern Arctic reached the Final Agreement stage in December 1991. The deal was later approved by the Inuit, and federal legislation implementing the agreement was given Royal Assent in June 1993. In the spring of 1995, the Nunavut Implementation Commission (NIC) publicly released its report entitled *Footprints in the Snow*, which set out recommendations on how the new government of Nunavut should be structured and organized. A follow-up report issued on 30 June 1995 analyzed various factors crucial for determining which site, Cambridge Bay, Iqaluit or Rankin Inlet, should be chosen as the new capital. The NIC concluded that, although Iqaluit emerges as best in several respects, many other factors place all three sites on an equivalent footing. The NIC acknowledged that choice of capital was essentially a political decision, rather than one based on technical merit. **In a plebiscite on the issue held in December 1995, a majority of residents chose Iqualuit as the preferred site for their capital city.**

More recently, legislation was passed to ratify the comprehensive land claim settlements and self-government agreements reached with four Yukon First Nations as well as the comprehensive land claim of the Sahtu Dene and Metis of the Northwest Territories. Bill C-16, the *Sahtu Dene and Metis Land Claim Settlement Act*, was given Royal Assent 23 June 1994. By virtue of this agreement, the Sahtu and Metis will receive title to 41,437 square kilometres of land, of which only 1,813 square kilometres include mineral rights. The federal government will transfer over $75 million to the Sahtu Dene and Metis in a 15- year period. As well, the federal government will annually pay the Sahtu Tribal Council a percentage of the resource royalties

received. Canada has undertaken to enter into negotiations with the Sahtu Dene and Metis in order to conclude agreements on self-government.

Following intense debate at the committee stage in both the House of Commons and the Senate, Bill C-33, the *Yukon First Nations Land Claims Settlement Act*, and Bill C-34, the *Yukon First Nations Self-Government Act*, received Royal Assent on 7 July 1994. It is important to note that the self-government agreements were negotiated under the Community-Based Self-Government policy developed by the previous administration. The federal government has since taken the position that the inherent right of self-government is an existing aboriginal or treaty right under section 35 of the *Constitution Act, 1982*. There is, however, no reference to this inherent right in any of the self-government agreements signed by the Yukon First Nations. According to government officials, the agreements would not receive constitutional protection as treaty rights at this time. Rights secured under the land claim agreements would, however, be regarded as treaty rights under section 35 of the *Constitution Act, 1982*. The third piece of legislation connected to this land claim, Bill C-55, the *Yukon Surface Rights Board Act*, received Royal Assent on 15 December 1994. The legislation will set up a regime with established rules and regulations for obtaining access to private and public lands. All three bills were proclaimed in force on 14 February 1995.

There have been other significant other developments in the 1990s. In British Columbia, a report prepared by a joint federal, provincial and aboriginal committee and aimed at simplifying land claims negotiations was released in the summer of 1991. The federal government accepted all 19 recommendations of the B.C. Claims Task Force Report, one of which was the creation of a B.C. Treaty Commission to settle land claims. On 21 September 1992, the federal government, the province and the First Nations' Summit signed the British Columbia Treaty Commission Agreement. The Commission was established on an interim basis in April 1993. The five appointed commissioners have been given the mandate to facilitate, not negotiate, modern-day treaties with all B.C. First Nations. Their main functions are to assess the readiness of parties to begin negotiations, allocate funding for that purpose to First Nations and assist parties in obtaining dispute resolution services. The Commission also monitors and reports on the status of

negotiations. In late June 1993, Canada and British Columbia created the "Treaty Negotiation Advisory Committee" which will provide policy and negotiating advice to governments on treaty-related matters that may directly affect third parties.

In its first annual report, the B.C. Treaty Commission stated it was confident that the process would work and result in fair and durable treaties. To date, the process has dealt only with preliminary matters essential to the treaty negotiations; negotiations on substantive issues have not yet been initiated.

A tripartite Agreement-in-Principle was signed in March 1996 between the Nisga'a, British Columbia and Canada. Negotiations had commenced over 20 years ago and, as a result, the agreement was reached outside the framework set up under the B.C. Treaty Commission. Under the agreement, the Nisga'a will obtain approximately 1,930 square kilometres of land in the lower Nass River area. The Nisga'a will receive $190 million in compensation, made up of $175.5 million from the federal government and $14.5 million from the provincial government. They will receive $11.5 million towards the purchase of commercial fishing vessels and licences, but the treaty will not contain constitutionally entrenched Nisga'a commercial fishing rights. In exchange, the Nisga'a have agreed eventually to relinquish the tax exemptions provided under the *Indian Act*. It has also been highlighted that the *Criminal Code*, the Constitution and the *Charter of Rights* will continue to apply to the Nisga'a.

In an appearance before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on 16 March 1994, the Honourable Ron Irwin stated that the federal government is committed to significantly increasing the rate at which land claims are being settled. The Minister of Indian Affairs and Northern Development also announced that the current comprehensive and specific claims policy is being reviewed.

2. Specific Claims

As of December 1993, there were 358 specific claims being considered by the federal government. Of these, 266 were under review, while 92 had reached the negotiation stage.

In addition, 252 claims had been concluded, of which only 108 had been resolved through a settlement agreement; 20 had been settled through litigation, and 23 through administrative referrals, while 53 had been rejected and an additional 48 files had been simply closed. The current rate at which settlements are being reached indicates that it will take well into the next century to process the backlog of claims in both categories.

In April 1991, a $355 million six-point initiative to deal with specific claims was announced. Pre-Confederation claims would now be accepted. Also announced was the establishment of an Indian Specific Claims Commission to provide an independent resolution mechanism. The Assembly of First Nations has been critical of the Commission on the grounds that it will not be an independent body. In a December 1991 appearance before the Standing Committee on Aboriginal Affairs, the National Chief of the AFN, Mr. Ovide Mercredi, indicated that the terms of reference in the Order in Council setting up the Commission are unacceptable: "These limitations tie the hands of the Commission and negate its independence."

Other organizations, including the Aboriginal Justice Inquiry of Manitoba, have called for an independent claims tribunal to resolve claims, both comprehensive and specific. The Indian Claims Commission of Ontario has proposed "an assisted negotiations" model for an independent body to monitor and facilitate the negotiating process.

In its Annual Report for 1994-95, the Indian Specific Claims Commission made six recommendations for improving the current claims policy and accelerating the process. The principal recommendation called for the creation of an Independent Claims Commission with the authority to break impasses in negotiations. **In a letter dated 27 June 1996, the five commissioners advised the Minister of Indian Affairs of their intent to resign and close down the Commission on 31 March 1997. The Commissioners expressed frustration with the lack of governmental response to the 18 inquiries completed to date and indicated that they may issue a special report in October on the steps needed to make the independent claims body more effective.**

A continuing area of controversy is the unclear distinction between specific and comprehensive claims. An example of this is the ongoing, well-publicized dispute between the federal government and the Lubicon Lake Band. The Lubicon people were overlooked in the 1899

negotiations of Treaty No. 8, and a 1949 federal promise to supply a reserve has been embroiled in various delays and controversies. A fundamental area of dispute is the federal position that the title of the Lubicon was extinguished by Treaty No. 8, which was intended to apply to territory that includes Lubicon land. In this view, the Lubicon claim is essentially a treaty claim and the federal obligation is limited to compensation to be determined by the terms of the 1899 treaty. The Lubicon, on the other hand, consider themselves to have an unextinguished aboriginal title to their traditional lands and, therefore, a comprehensive claim, open to settlement on the more expansive terms typical of modern claims agreements. **In 1994, the various parties reached an agreement to resume negotiations. Harold Millican was appointed as the federal negotiator in February 1995. Formal negotiations are still ongoing.**

3. Treaty Land Entitlement

In Saskatchewan, another claims settlement process has achieved results. In September 1992, the federal government, the province of Saskatchewan and a group of treaty bands concluded the Treaty Land Entitlement (Saskatchewan) Agreement and the Nekaneet Agreement, which will provide the means for 27 bands in Saskatchewan to obtain land owed to them under the provisions of Treaties 4 and 6. This settlement will provide $455 million over 12 years, cost-shared between the federal and Saskatchewan governments (originally 70%/30%, with Saskatchewan later contributing an additional 19% of the total). Entitlement bands, pursuant to their own specific agreements, will be able to purchase land to make up the shortfall owed to them under the treaties. Legislation to implement the federal aspects of this settlement was given Royal Assent on 30 March 1993.

G. International Law

Canada is a party to the International Covenant on Civil and Political Rights, which provides that "all people have the right to self-determination." The Covenant does not address the ways in which a "people" may realize this right, especially where they live within an existing state. In 1989, the International Labour Organization revised the only existing international instrument on

indigenous rights (Convention 169, the Indigenous and Tribal Peoples' Convention). The United Nations proclaimed 1993 as the International Year of the World's Indigenous People, with the theme of "Indigenous People -- a new partnership." Resolutions on Indigenous Rights were considered by both the General Assembly and the United Nations Human Rights Commission in meetings held early in 1993.

The United Nations Working Group on Indigenous Populations currently has a mandate to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, and to give special attention to the evolution of standards concerning the rights of indigenous populations. The Working Group has completed work on a draft declaration on the rights of indigenous people. The draft declaration was submitted to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1993. In August 1994, the Sub-Commission voted to send the draft declaration to the Commission on Human Rights. **The Commission, made up of State representatives, has struck its own working group to review the terminology set out in the draft: the lack of a definition of "indigenous" has been one contentious issue.** Following this second review, the document will have to be approved by the Economic and Social Council, before being considered by the General Assembly of the United Nations.

In the interim, in July 1994 the Chair of the UN Working Group on Indigenous Populations tabled Draft Principles and Guidelines for the Protection of the Heritage and Culture of Indigenous Peoples. This endorsed the principle of self-determination and the right and duty of indigenous peoples to develop their own cultures and knowledge systems. The second and final draft were to be presented for consideration to the Sub-Commission in the summer of 1995 and later sent to the Commission on Human Rights for adoption in the winter of 1996.

The United Nations General Assembly passed a resolution declaring that the International Decade for Indigenous Peoples would begin in December 1994.

PARLIAMENTARY ACTION

The most important legislative action in recent years was the enactment of constitutional provisions respecting aboriginal and treaty rights in the *Constitution Act, 1982*, Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 (sections 25, 35 and 37). These provisions were added to by the *Constitution Amendment Proclamation, 1983*.

The first modern claims settlement was ratified by federal legislation, the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32. The Northeastern Quebec Agreement settling the aboriginal land claims of the Naskapi of Quebec is an addendum to the James Bay Agreement; it was ratified by order in council in 1978. The Inuvialuit Final Agreement, was ratified by the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24. The Gwich'in Comprehensive Land Claim Agreement was approved in December 1992 by Bill C-94, the *Gwich'in Land Claim Settlement Act*.

The land claim of the Inuit of the Eastern and Central Arctic, which included the creation of a new territory known as "Nunavut," was finalized with the enactment of the *Nunavut Act* and the *Nunavut Land Claims Agreement Act* in June 1993. The Nunavut territory and government will be established on 1 April 1999, with jurisdictional powers and institutions comparable to those of the two other territories.

On 10 December 1992, Bill C-104, the *Treaty Land Entitlement Act*, a bill to implement the Saskatchewan Treaty Land Entitlement agreement was introduced in the House of Commons. The bill was quickly passed by both Houses and given Royal Assent on 30 March 1993.

Bill C-16, the *Sahtu Dene and Metis Land Claim Settlement Act*, was given Royal Assent 23 June 1994. Enactment of the bill was necessary to ratify the land claim agreement signed by the federal government and the representatives of the Dene of Colville Lake, Déline, Fort Good Hope and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Northwest Territories on 6 September 1993. Canada has undertaken to negotiate self-government agreements with the Dene and Metis in the near future.

Bill C-33, the *Yukon First Nations Land Claims Settlement Act*, and Bill C-34, the *Yukon First Nations Self-Government Act*, also received Royal Assent in the summer of 1994. The rights secured under the land claim agreements for the Yukon signatories are modern day treaty rights guaranteed constitutional protection under section 35 of the *Constitution Act, 1982*. The self-government agreements will not receive constitutional protection as treaty rights, since they were negotiated under the policy of the previous administration, which did not recognize the inherent right of self-government. The third component of this land claim, Bill C-55, the *Yukon Surface Rights Board Act*, received Royal Assent on 15 December 1994.

As mentioned earlier, the Minister of Indian Affairs and Northern Development has proposed substantial amendments to the *Indian Act*, and has undertaken to introduce the bill in the House of Commons prior to year-end.

CHRONOLOGY

1725 - The first of a series of pre-Confederation peace treaties was entered into between indigenous people in the Maritimes and the British colonial government.

1763 - The Royal Proclamation of 1763 codified a developing colonial practice of obtaining land cessions from indigenous people in advance of settlement.

1867 - *Constitution Act, 1867*, section 91(24) was enacted, empowering the federal government to pass legislation respecting "Indians and lands reserved for the Indians."

1871-1921 - A series of major numbered treaties was negotiated covering the prairie provinces, and parts of B.C., Ontario and the two territories.

1870s-1921 - A series of "Halfbreed Commissions" travelled with the treaty commissions to deal with Metis claims to aboriginal title through land and money scrip grants.

1876 - The first consolidated *Indian Act* was passed, imposing a uniform system of band government subject to federal control.

1889 - In *St. Catharines Milling and Lumber Co.* v. *The Queen*, the British Privy Council decided that aboriginal title as a "personal and usufructuary right" was alienable only to the Crown, a position rejected by the Supreme Court of Canada in the 1980s.

1969 - The federal government issued a White Paper recommending the abolition of all legal distinctions between indigenous people and other Canadians. This policy was completely rejected by indigenous groups, who asserted the validity of their unique constitutional position. This led to the withdrawal of the White Paper.

- The federal government announced its intention to meet its lawful obligations to indigenous people.

1960 and 1970s - Substantial indigenous activism on land claims and other issues led to various changes in federal aboriginal affairs policy and land claims research projects across the country.

1973 - The Supreme Court of Canada decision in *Calder* v. *A.G.B.C.* caused the federal government to reverse its position that aboriginal title was not a concept existing in Canadian common law.

1973 - The federal government announced comprehensive and specific claims policies to deal with claims based upon unextinguished aboriginal title, unfulfilled treaty rights and other legal obligations.

1974 - The James Bay and Northern Quebec Agreement was reached to settle the claims of Cree and Inuit in northern Quebec.

1980s - Aboriginal rights litigation increased substantially. Decisions of the Supreme Court of Canada demonstrated that aboriginal title interests and the federal fiduciary duty were capable of giving rise to federal liability.

1982 - The *Constitution Act, 1982* was enacted; three provisions related to aboriginal and treaty rights (sections 25, 35 and 37).

1983 - The Constitution Amendment Proclamation extended the schedule for First Ministers' Conferences on aboriginal rights in the Constitution and amended the 1982 provisions.

1984 - Inuvialuit Final Agreement for the settlement of claims of the Inuit in the Western Arctic - the first and only final claims agreement reached through the comprehensive claims process itself.

1985 - A federal task force to review comprehensive claims policy issued its report "Living Treaties: Lasting Agreements."

1986 - The federal government announced changes to its comprehensive claims policy.

1987 - The Standing Committee on Indian Affairs and Northern Development held hearings on the comprehensive claims policy but did not report.

1988 - A Special Committee of the Canadian Bar Association reviewed aboriginal rights issues and policies and made 30 recommendations in its report *Aboriginal Rights: An Agenda for Action.*

1990 - Final Agreements were reached with the Dene/Metis of the Northwest Territories and the Council of Yukon Indians, regarding their comprehensive claims. The Dene/Metis Agreement was not ratified by the communities, however. An Agreement-in-Principle was reached with the Tungavik Federation of Nunavut (Eastern Arctic). Final Agreement was reached in 1991.

1990 - *Sioui*, *Sparrow*, and *Horseman* were the first decisions rendered by the Supreme Court of Canada on section 35 of the *Constitution Act, 1982.*

1991 - The British Columbia Supreme Court handed down a negative decision in the *Delgamuukw* case on the aboriginal title of the Gitskan and Wet'suwet'en in B.C.

1991 - Royal Commission on Aboriginal Peoples appointed.

1991 - The federal government proposed a constitutional amendment to recognize self-government.

1992 - The Special Joint Committee on a Renewed Canada released its report on the federal proposals for constitutional reform. It made a number of recommendations on aboriginal matters.

1992 - The Charlottetown Accord was rejected in a national plebiscite. If implemented, this agreement would have entrenched the inherent right of self-government in the *Constitution Act, 1982*.

1992 - Bill C-94, an Act to implement the Gwich'in Land Claim Agreement was given Royal Assent on 17 December.

1993 - International Year of Indigenous People.

1993 - Federal legislation to create Nunavut and confirm the Nunavut Land Claims Agreement of the Inuit in Eastern Arctic was given Royal Assent on 10 June 1993.

1993 - The British Columbia Court of Appeal released eight decisions dealing with aboriginal rights. The *Delgamuukw* case declared that aboriginal sustenance gathering rights of the Gitskan and Wet'suwet'en people had not been extinguished by colonial instruments. The right to sell fish for commercial purposes was rejected in the *Van Der Peet*, *Gladstone* and *Smokehouse* cases.

1993 - The Royal Commission on Aboriginal Peoples released "Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution," its second paper on self-government issues.

1994 - On 10 March, the Supreme Court of Canada granted leave to appeal in *Gladstone*, *Van Der Peet* and *Smokehouse* and *Delagamuukw*.

1994 - On 12 May, the Supreme Court of Canada released its decision in *Howard* v. *The Queen*. It followed lower court rulings that a clause in the 1923 Williams Treaty extinguished the Indian signatories' fishing rights in Ontario.

1994 - Bill C-16, the *Shatu Dene and Metis Land Claim Settlement Act*, received Royal Assent on 23 June 1994.

1994 - On 7 December 1994, a historic agreement to dismantle the regional operations of DIAND in Manitoba was signed by the Minister of Indian Affairs Canada and the Grand Chief of the Assembly of Manitoba Chiefs.

1995 - On 14 February, Bill C-33, the *Yukon First Nations Land Claims Settlement Act*, Bill C-34, the *Yukon First Nations Self-Government*

Act, and Bill C-55, the *Yukon Surface Rights Board Act*, were proclaimed in force.

1995 - The Royal Commission on Aboriginal Peoples published its interim report entitled *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment.*

1995 - Both the B.C. Treaty Commission and the Indian Specific Claims Commission published their annual reports, with recommendations on how to improve the treaty and land claims process.

1995 - The Nunavut Implementation Commission released reports on how the new territorial government should be structured and where the capital should be established.

1995 - In *A New Partnership*, dated 16 June, Justice Hamilton reported his findings on how to achieve certainty in land claims without requiring blanket extinguishment clauses.

1995 - In August, the federal government released its new policy guide on aboriginal self-government.

1996- In February, the Royal Commission on Aboriginal Peoples released a report advocating the establishment of aboriginal criminal justice systems.

1996- Agreement-in-Principle signed by the Nisga'a, Canada and British Columbia in March.

1996- The New Brunswick Court of Appeal declared that recent amendments to the province's sales tax legislation were invalid since they violated the tax exemption rights provided under section 87 of the *Indian Act* to status Indians and bands. The province wanted to restrict the application of the tax exemption to goods and services purchased on the reserve, or delivered to the reserve by the vendor. As a result of the court ruling, status Indians and bands would not be required to pay sales tax for goods purchased either on or off-reserve, as long as these were destined to be consumed on reserve (*Union of N.B. Indians* v. *Min. of Finance*, 135 D.L.R. (4th) 193).

1996- Several landmark rulings by the Supreme Court of Canada were released. In two cases released in April, the Court quashed band by-laws purporting to regulate fishing on-reserve and upheld the *Fisheries Act* and *Regulations* as the governing legislation (*Nikal* and *Lewis*). In August, the Court extensively examined aboriginal commercial fishing rights in the *Van Der Peet*, *Gladstone* and *Smokehouse* trilogy: the Court ruled essentially that an aboriginal right to sell fish can exist if the right formed an integral part of the distinctive traditions, customs and practices of the particular aboriginal community prior to European contact. In September, the Court ruled that an aboriginal right could exist independently of a claim to aboriginal title in land (*R.* v. *Côté* and *R.* v. *Adams*).

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